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Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

JEFFREY SENECHAL,

Petitioner,

v.

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court order, in a civil action for personal injuries, compelling Defendant, Jeffrey Senechal to undergo deoxyribonucleic acid (DNA) testing violates his privacy rights under the Fourth Amendment to the United States Constitution?

II. Whether the Plaintiff, Jane Doe has failed to satisfy Mass. R. Civ. P. 35(a) requirements of "in controversy" and "good cause" thereby resulting in a violation of Defendant, Jeffrey Senechal's right to privacy pursuant to the Fourth Amendment of the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts that gives rise to this petition is reported as *Doe v. Senechal*, 431 Mass. 78, 725 N.E.2d 225 (2000). It is reprinted within the Petitioner's Appendix at page 13a . The decision of the motion judge is unreported but is reprinted within the Petitioner's Appendix at page 1a.

JURISDICTION

On March 20, 2000 the Supreme Judicial Court of Massachusetts ("SJC") affirmed the decision of the motion judge to compel Jeffrey Senechal to undergo deoxyribonucleic acid (DNA) testing regarding paternity, holding that the Fourth Amendment does not apply to a civil action between private litigants. The SJC further found that Jane Doe satisfied the "in controversy" and "good cause" standard of Mass. R. Civ. P. 35(a), 365 Mass. 793 (1974) analysis. Lastly, the SJC held that in the event that the Fourth Amendment does apply to civil actions between private litigants, the DNA test ordered meets the standard of reasonableness.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Rule 35(a) of the Massachusetts Rules of Civil Procedure, 365 Mass. 793 (1974), provides:

> When the mental or physical condition (including the blood group) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person and persons by whom it is to be made.

U.S.C.A. Const. Amend. IV-Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This matter involves personal injuries allegedly sustained by the Plaintiff, Jane Doe, as a result of an alleged sexual encounter with the Defendant, Jeffrey Senechal. At the time of the alleged incident, Ms. Doe was an in-patient at West Lake Academy, a secured treatment program operated by Health & Education Services, Inc. under contract with the Department of Mental Health. The Defendant, Jeffrey Senechal, was an employee of Health & Education Services, Inc. and West Lake Academy at the time of the alleged incident. Ms. Doe claims that as a result of sexual intercourse with Mr. Senechal, she became pregnant and had to give her baby up for adoption. The Plaintiff's Second Amended Complaint sets forth standard claims of negligence, emotional distress, violations of her State and Federal civil rights and a claim for assault and battery against Jeffrey Senechal.

Ms. Doe's allegations of an alleged sexual relationship came to light at the time of her discharge from the program on or about June 26, 1995, when she left a letter for Mr. Senechal with another counselor at West Lake. The counselor read the letter, which contained references to alleged sexual activity between Mr. Senechal and Ms. Doe. The contents of the letter were reported to the proper West Lake Academy supervisory personnel and, as a result, a "51A" report was filed with the Massachusetts Department of Social Services. The Department of Social Services subsequently dismissed the report. In addition, the Department of Mental

Health conducted its own independent investigation and found Ms. Doe's claims to be unsubstantiated.

According to the Department of Mental Health's decision letter, Ms. Doe claims that she engaged in sexual intercourse with Mr. Senechal on three separate occasions: June 16, June 18 and June 23, 1995. Each of the encounters is alleged to have taken place during a transport by Mr. Senechal of the Plaintiff to and from the bus station.[1] After a thorough investigation, the Department of Mental Health concluded that Ms. Doe and Mr. Senechal "could not have engaged in sexual relations on June 23, 1995," since, Mr. Senechal did not transport Ms. Doe to and from the bus station on that day as he was in New Hampshire on a program sponsored outing. The Department of Mental Health further concluded "that it is highly unlikely they engaged in such relations on June 16, 1995," since, considering their departure time from West Lake Academy, it appeared unlikely that Mr. Senechal and Ms. Doe would have had sufficient opportunity to pull off the road, undress, engage in the sexual acts described by Ms. Doe in her letter to Mr. Senechal, and then dress themselves and travel to Boston in time to park the car, and for Ms. Doe to purchase a ticket and board the bus on time. Lastly, the Department of Mental Health found that "given the lack of corroborating evidence, it is not possible to determine

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[1] As part of Ms. Doe's Service Plan, she was allowed to make weekend trips to Maine to visit her mother in the month prior to her discharge from West Lake Academy. To enable this, West Lake Academy arranged for staff members to drive her to a Boston bus station at the beginning of her visits and to pick her up at the station upon her return.

whether such relations occurred on June 18, 1995." As a result, the Department of Mental Health found Ms. Doe's allegations to be "unsubstantiated."

Among those interviewed by the Department of Mental Health in its investigation of the alleged incident was the Plaintiff's mother. According to the Department of Mental Health, Ms. Doe's mother told the investigator that Ms. Doe had informed her that she became pregnant from a sexual encounter on June 18, 1995 with an unknown passenger on the bus she took on that date from Maine to Boston. On that day, Mr. Senechal saw Ms. Doe give a "good bye kiss" to a man at the terminal after she had disembarked from the bus. The Department of Mental Health's decision letter references rumors circulating among West Lake residents that Ms. Doe and the man seen at the bus station had engaged in sexual relations.

Mr. Senechal denies any sexual contact between himself and Ms. Doe. He has further denied the paternity of Ms. Doe's child. To establish paternity, Ms. Doe requested that Mr. Senechal undergo deoxyribonucleic acid (DNA) testing. Mr. Senechal refused asserting that Ms. Doe had failed to establish the "in controversy" and "good cause" standard under Rule 35, and moreover, any such testing would be a violation of his Fourth Amendment right to privacy. Ms. Doe then filed a Motion to Compel Mr. Senechal to undergo such testing in the Massachusetts Superior Court. Mr. Senechal filed an Opposition to such Motion asserting his Fourth Amendment right among other arguments. Specifically, Mr. Senechal alleged that he should not be ordered

to undergo the DNA testing "as such testing is a highly invasive and intrusive procedure for which there is absolutely no precedent or support in personal injury actions like the present. Such a procedure necessarily implicates Mr. Senechal's privacy rights and protections afforded by the Fourth Amendment to the United States Constitution." (Citations omitted.)

On May 14, 1999, after a hearing, the motion judge issued a Memorandum of Decision and Order on Plaintiff's Motion to Compel a Rule 35 Examination of Jeffrey Senechal, allowing Ms. Doe's Motion and ordering Mr. Senechal to undergo a paternity test. [App. 1a]. Mr. Senechal filed a petition with a single justice of the Massachusetts Appeals Court for an interlocutory appeal, again asserting that the court order violated his Fourth Amendment rights. The single justice denied the relief requested, but granted an interlocutory appeal to the full Appeals Court. [App. 9a]. The SJC granted Ms. Doe's application for direct appellate review. Mr. Senechal continued to argue that the court ordered DNA testing resulted in a violation of his Fourth Amendment right to privacy. After briefing and a hearing upon the matter, the SJC affirmed the motion judge's ruling holding that the Fourth Amendment does not apply to civil actions between private litigants and that Jane Doe satisfied the "in controversy" and "good cause" standard of Mass. R. Civ. P.35(a), 365 Mass. 793 (1974). [App. 13a]. The SJC further held that in the event that the Fourth Amendment did apply to civil actions between private litigants, the DNA test ordered would meet the standard of reasonableness. [App. 24a].

ARGUMENT

I. THE COURT ORDER, IN A CIVIL ACTION FOR PERSONAL INJURIES, COMPELLING DEFENDANT, JEFFREY SENECHAL TO UNDERGO DEOXYRIBONUCLEIC ACID (DNA) TESTING VIOLATES HIS PRIVACY RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Fourth Amendment Applies to the Court Order Requiring Jeffrey Senechal to Undergo DNA Testing in a Civil Action Between Private Litigants.

It is a firmly established principle of law in this country that individuals retain an expectation of privacy and a right to be free from government sponsored intrusions into the integrity of their own bodies. See *Skinner v. Railway Labor Executives' Assn'n*, 489 U.S. 602, 616-618 (1989); *Schmerber v. California*, 384 U.S. 757, 767 (1966). "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The Supreme Court of the United States has held that the extraction of blood, as well as the taking of urine samples, constitute a search and seizure within the meaning of the Fourth

Amendment. *Schmerber, supra*; *Skinner, supra.* The Court further noted in *Schmerber* that "[t]he integrity of an individual's person is a cherished value of our society." *Schmerber* at 772. Saliva and tissue samples, of the kind involved in the testing ordered by the motion judge and affirmed by the SJC, have been likened to blood and urine samples because they can provide a significant amount of genetic identity information and are generally not items in the public domain. *United States v. Nicolosi*, 885 F. Supp. 50, 55 (D.N.Y. 1995). The *Nicolosi* Court stated the following:

> It is typically the case that a saliva sample is obtained by swabbing the inside of the subject's mouth with a pad of some sort. Such a scenario, wherein a citizen is directed to submit to intrusion into his body, is properly viewed as implicating his dignitary interests. This factor, combined with the private identifying information contained in the sample suggest that a proper compliance with the requirements of the Fourth Amendment is mandated. *Id.*

Additionally, many courts, and most recently the Supreme Judicial Court of Massachusetts, have held that obtaining and analyzing DNA is a search and seizure implicating Fourth Amendment concerns. *Landry v. Attorney General*, 429 Mass. 336, 347 (1999); see also *Rise v. State of Oregon*, 59 F.2d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302

(4th Cir. 1992); *Shelton v. Gudmanson*, 934 F. Supp. 1048 (W.D. Wisconsin 1996) (assuming that non-consensual cheek swabbing to obtain DNA material is a search under the Fourth Amendment); *Mayfield v. Dalton*, 901 F.Supp. 300, 303 (D. Hawaii 1995), *vacated and remanded to dismiss as moot*, 109 F.3d 1423 (9th Cir. 1997) (holding that the taking of DNA by means of blood samples and epithelial cells from the inside of a cheek using a cotton swab constitutes a "seizure" subject to scrutiny under the Fourth Amendment). In such cases, it is the identifying genetic information contained within the sample that implicates the subject's privacy interests.

In its decision regarding the testing of Mr. Senechal, the SJC relied upon *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) in which this Court held that "Rule 35 . . . is free of constitutional difficulty." *Id.* at 114. However, the ruling in *Schlagenhauf* was offered well before the body of law arose addressing the right to privacy pursuant to the Fourth Amendment when concerning DNA testing. In 1964, the science of DNA testing was in its infancy and certainly was not an issue addressed or contemplated in *Schlagenhauf*. The type of testing sought in *Schlagenhauf* consisted of standard mental and physical testing, including testing to be completed by doctors of internal medicine, ophthalmology, neurology and psychiatry. *Schlagenhauf* at 107. The Court never anticipated nor envisioned the extent of testing which now can be performed based upon scientific advances. Generally, the art of DNA fingerprinting was first developed in 1985, well after the privacy concerns were at issue in *Schlagenhauf*. See Andrea De Gorgey,

Note, *The Advent of DNA Databanks: Implications for Information Privacy*, 16 Am. J.L. & Med., 381, 382 n. 5 (1990).

As indicated above, DNA testing involves a significant amount of genetic identity information not in the public domain. In fact, it contains all of the information unique to the creation of an individual. Deborah F. Barfield, *DNA Fingerprinting - Justifying the Special Need for the Fourth Amendment Intrusion into the Zone of Privacy*, 6 Rich. J.L. & Tech. 27 (2000). This is the most personal and individualized type of testing which can be conducted upon a person. It is not the type of testing at issue in *Schlagenhauf* but now, through the advances of science, the testing requested has the ability to identify the very core of a human being.

B. Other Courts Have Raised the Issue of Whether the Fourth Amendment Applies to Civil Discovery Orders.

The issue of whether the Fourth Amendment applies to court orders in civil actions has been raised in various courts throughout the country. See *Bowerman v. MacDonald*, 431 Mich. 1, 19 (1988); *United States v. International Business Machs. Corp.*, 83 F.R.D. 97, 103 (S.D.N.Y. 1979); *Ambassador College v. Goetzke*, 244 Ga. 322, 325, *cert. denied*, 444 U.S. 1079 (1980). The defendant in *Bowerman* refused to take a court ordered paternity test arguing that the "blood test in a paternity case implicates the Fourth Amendment since it involves state action, which he finds in the fact that the blood test is

ordered by a court pursuant to a statute." *Bowerman, supra* at 19. The Supreme Court of Michigan believed that the Fourth Amendment would not apply, but nonetheless went on to conduct an analysis upon the issue of whether the test was reasonable. *Id.*

In *United States v. International Business Machs. Corp., supra,* the United States District Court for the District of Southern New York dealt with the issue of whether a subpoena issued in a civil action, where the state is a party, would implicate the Fourth Amendment. The Court acknowledged the same type of argument brought forth in the instant action that "[t]he requisite state action component of a fourth amendment claim in all civil cases, whether the government appears or not, would be the court's involvement in issuing and enforcing the subpoena." *Id.* at 102. The Court went on to state that it did not believe the Fourth Amendment would apply, but again applied the test for reasonableness to the facts at hand to determine if the subpoena would pass a Fourth Amendment analysis.

In a concurring opinion in *Ambassador College v. Goetzke, supra,* the Supreme Court of Georgia raised an almost identical issue as the questions presented by Mr. Senechal in the instant action. Although not dispositive in that case, Justice Hill raised the question of whether

> [I]n a proper case we should consider the question of whether the powers of the state (i.e., the civil practice rules relating to discovery) are being used by civil litigants pursuing unsubstanti-

> ated claims in violation of the right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures, and whether the probable cause requirements of the fourth amendment relating to search warrant is applicable to civil discovery procedure and orders. *Id.*

Certainly, this is an issue that has been raised and addressed by other Courts throughout the United States with no answer as to the application of the Fourth Amendment to civil discovery orders. Therefore, it is a question that should be addressed by this Court for a final resolution of the issue.

C. The Court Ordered DNA Test Does Not Meet the Standard of Reasonableness.

As the SJC recognized, in order to satisfy the requirements of the Fourth Amendment, searches and seizures must "meet the standard of reasonableness." [App. 24a]. "[T]he ultimate determination of a search's reasonableness requires a judicious balancing of the intrusiveness of the search against its promotion of a legitimate government interest." *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D. N.J. 1986) and cases cited; see also *Skinner, supra* at 619.[2] The degree of intrusion

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[2] In most criminal cases, the balance is stricken in favor of the procedures described by the Warrant Clause of the Fourth

caused by any search must be viewed in the context of the individual's legitimate expectation of privacy. *Capua* at 1514. Generally, "[a]s measured by the expectation of privacy, inspections of personal effects are generally least intrusive, while breaches of the 'integrity of the body' result in the greatest invasion of privacy." *Guiney v. Roache*, 686 F. Supp. 956, 960 (D. Mass. 1988), quoting *Capua* at 1514. Moreover, there are two types of seizures occurring in the instant case. Mr. Senechal must undergo the actual intrusion into his bodily integrity to obtain the sample, then the sample itself, still a part of Mr. Senechal as it is his genetic marker, is taken and subjected to additional testing. See *Arizona v. Hicks*, 480 U.S. 321, 324-325 (1987). The very fingerprint of Mr. Senechal's being is removed and tested. The allowance of such intrusions must be outweighed by a governmental interest.

The SJC, in determining that the court order met the standard of reasonableness, failed to identify a single legitimate government interest. Instead, the SJC stated that "the 'reasonable expectation is that the test results will strongly point to, but not conclusively prove' the pregnancy." (citation omitted)

Amendment. *Skinner, supra* at 619. "Except in certain well-defined circumstances, a search and seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Id.* The Supreme Court has recognized exceptions to this rule, however, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.* When faced with such special needs, the Court has adopted a balancing approach, weighing the governmental and privacy interests at stake. *Id.* It is this balancing approach which the Motion Judge applied below and on which the Defendant focuses his argument.

[App. 24a]. However, whether Ms. Doe is assisted in her claims does not promote a legitimate government issue and therefore, such assistance should be trumped by Mr. Senechal's constitutional right to an expectation of privacy. Moreover, the SJC has admitted that the paternity testing will not conclusively prove the pregnancy. To allow such testing, even though it will not be dispositive of the final issue would not meet the standard of reasonableness.

The present case is not a paternity action where the government has an interest, as expressed in statute, in ensuring that children born out of wedlock enjoy rights equal to the rights enjoyed by children whose parents were married at the time of their birth. See M.G.L. c. 209C, Section 1. Nor is this an action in which the government is a party, as in a criminal case where a legitimate State interest in solving and prosecuting crimes clearly exists. Instead, this is a purely private dispute for monetary damages in which the government does not have any legitimate interest, much less an interest that would override the Defendant's privacy rights.

Moreover, it is critical to the above analysis that the Defendant, Jeffrey Senechal, is a "free" civil litigant and does not belong to any group that courts have recognized as possessing diminished privacy rights. Mr. Senechal is not a convicted person or a public employee engaged in a safety-sensitive task, the groups most commonly recognized as having diminished privacy rights. See *Landry*, *supra* at 344 ("...convicted persons, unlike other citizens, have a diminished expectation of privacy in their identity."); See also *Skinner*, *supra* at 627

("...expectations of privacy of [railroad] employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety..."). Mr. Senechal, therefore, has a greater expectation of privacy in his DNA than is accorded such convicted persons or public employees engaged in safety-sensitive tasks.

For example, courts which have upheld against Fourth Amendment attack the obtaining and analyzing of DNA from convicted persons as part of a statutory scheme to maintain a DNA database for purposes of resolving past and future crimes, have explicitly relied on the convicted person's diminished privacy rights. *Landry*, *supra* at 344; *Jones*, *supra* at 306 ("...when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it."). As the Court in *Rise* explained:

> [Convicted] persons do not have the same expectations of privacy in their identifying genetic information that "free persons" have. Once a person is convicted ... his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling. *Rise*, *supra* at 1560.

It is the convicted person's diminished privacy rights, combined with the government's compelling interest in the investigation and prosecution of un-

solved and future criminal acts, which has justified the search and seizure of the person in each such case by means of obtaining a DNA sample.

In contrast, there is no such diminished privacy right with respect to a "free" person or civil litigant. As is implicit in the above decisions, a "free" person has a far greater expectation of privacy in his or her bodily integrity and identifying genetic information.

Clearly, in the context of the present personal injury action to which the Defendant was made an unwilling party, the buccal swab test at issue, requiring the scraping of tissue from Mr. Senechal's inner cheek, is an invasive procedure which must be judged against the government's interest, if any, in obtaining his bodily fluids for purposes of DNA analysis. Mr. Senechal certainly has an expectation of privacy in his bodily integrity and very private identifying genetic information, which is not outweighed by any legitimate government interest. The "integrity of the truth seeking process," as the Motion Judge characterized the government interest at issue, while certainly a desirable state of affairs, is too abstract to qualify as the type of legitimate State interest needed for a Fourth Amendment balancing of interests and was not adopted by the SJC. [App. 7a]. Any individual's right to privacy would always be trumped by such an all-encompassing standard. What the Motion Judge has envisaged is akin to saying that the legitimate State interest which justifies searches and seizures in criminal cases is our desire to live in a crime-free society. Measured against that amorphous standard, no individual right could be thought to be more weighty. In addition, a civil litigant, such as the Plaintiff here, has

other means available to her to challenge the Defendant's credibility, means which would exist whether or not she had conceived a child. A constitutionally infirm means of accomplishing the same thing ought not to be sanctioned just because it may appear to be expedient.

II. THE PLAINTIFF, JANE DOE HAS FAILED TO SATISFY MASS. R. CIV. P. 35(A) REQUIREMENTS OF "IN CONTROVERSY" AND "GOOD CAUSE" THEREBY RESULTING IN A VIOLATION OF DEFENDANT, JEFFREY SENECHAL'S RIGHT TO PRIVACY PURSUANT TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Assuming arguendo that the Fourth Amendment is not implicated in Rule 35 examinations, if the requirements of Rule 35 are not adequately satisfied any testing order under the faulty analysis would certainly trigger a Fourth Amendment violation.

Therefore, this Court should review the analysis and conclusions of the SJC in holding that Ms. Doe has satisfied such requirements to ensure that Mr. Senechal's Fourth Amendment rights are protected.

Mass. R. Civ. P. 35, which tracks Federal Rule of Civil Procedure 35, "requires discriminating application by the [Motion] judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy'

and 'good cause', which requirements . . . are necessarily related." *Schlagenhauf, supra* at 118-119. As this Court emphasized in *Schlagenhauf*, the "in controversy" and "good cause" requirements of Rule 35 "are not met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Id.* at 118.

The record below plainly shows that the Plaintiff, as the moving party, failed to make the proper showing to support the involuntary paternity testing of a Defendant in a purely private civil lawsuit for money damages. As the SJC recognized, but failed to apply correctly to the facts of this case, "[t]he condition sought to be placed in controversy must bear directly on a determination of the merits of an issue and not a collateral matter." [App. 18a, citing to *State Ex Rel. C.S. v. Dowd*, 923 S.W. 2d 444, 448 (Mo. App. E.D. 1996)]. Specifically, the court in *Dowd* stated that ". . . for a condition to be in controversy, the condition must bear directly on the proof of the elements of a cause of action or defense." *Dowd* at 447-448. See also *Gasparino v. Murphy*, 352 So. 2d 933, 935 (Fla. App. 1977) (stating "in controversy" means the condition must be "directly involved in some material element of the cause of action or defense"). It is not enough that the elements of a claim or defense could be better proved by evidence of a party's physical or mental condition. *Bennett v. White Laboratories, Inc.*, 841 F. Supp. 1155, 1157 (M.D. Fla. 1993).

In *Dowd*, a case factually similar to the present case, the plaintiff brought a battery claim against the defendant alleging that the defendant had non-consensual sexual intercourse with her when she was a patient undergoing treatment for depression. *Dowd* at 446. The plaintiff in *Dowd* stated in Answers to Interrogatories that the defendant was not circumcised, while the defendant, in his own Answers to Interrogatories, stated that he had been circumcised. *Id.* The plaintiff subsequently filed a motion for an order requesting the defendant to submit to a physical examination pursuant to Rule 60.01(a), the local counterpart to Fed. R. Civ. P. 35, to determine whether the defendant was, in fact, circumcised. *Id.* Although the trial court granted the plaintiff's motion, the Court of Appeals of Missouri reversed, holding that the defendant's condition, i.e., whether he was circumcised, was not "in controversy" within the meaning of Rule 35 because the results of the desired examination would not go to prove an element of the plaintiff's battery claim, but rather, would only bear upon the credibility of either party:

> The underlying cause of action is battery. A battery occurs when there is an intended, offensive, bodily contact with another. *Martin v. Yeoham*, 419 S.W. 2d 937 (Mo. App. 1967); *Adler v. Ewing*, 347 S.W. 2d 396 (Mo. App. 1961). The objective elements of battery will not be proved by the results of the requested physical examination. Even if a physical examination dis-

> closed that [defendant] was not circumcised, this fact would not prove any of the elements of battery: that [defendant] had intentional, offensive, bodily contact with [plaintiff]. Conversely, [defendant's] averment that he was circumcised does not directly absolve him of liability. The elements of battery could be proved even if [plaintiff] was mistaken about one of her observations of [defendant's] physical appearance. The question of circumcision does not therefore directly relate to the proof or defense of the tort of battery.
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> . . .
>
> In this case, the issue of [defendant's] circumcision is a credibility issue. Examination results could be used to bolster or damage either party's credibility but would not resolve the true issues of the case: whether [defendant] committed a battery. The issue of whether [defendant] is circumcised is collateral and not 'in controversy' as that term is used in Rule [35]. *Dowd* at 449.

Similarly, in the present case, the question of paternity does not directly relate to the proof or defense of the Plaintiff's claims of assault and battery, negligence, emotional distress and violation of her

civil rights. None of the Plaintiff's tort claims against the Defendant, and especially her claim for assault and battery, can be proved by the results of the desired paternity testing. Results of paternity testing are not, themselves, evidence of intercourse. *Commonwealth v. Beausoleil*, 397 Mass. 206, 220 (1986). Thus, even a positive test result would not prove that the Plaintiff and Defendant had sexual intercourse, much less non-consensual sexual intercourse, which is the Plaintiff's present claim. Nor would a negative result preclude liability against Mr. Senechal, since the elements of each of the Plaintiff's tort claims, which are based on an alleged sexual assault, do not depend upon proof of paternity. Like the issue of circumcision in *Dowd*, the issue of paternity in this case is solely a credibility issue. Such an application of Rule 35, no matter how tempting, or "practical" in the view of the Motion Judge, is impermissible because paternity is not "in controversy." The Plaintiff must resort to traditional means to seek to attack the Defendant's credibility or to seek to bolster her own. Rule 35 is not a tool to obtain evidence bearing solely on the credibility of witnesses.

In another case similar to the instant action, the Family Court of New York denied the Plaintiff's request to compel the Defendant to undergo paternity testing in a sexual abuse case. *In the Matter of Ivette D.*, 460 N.Y.S.2d 718 (1983). The Court reasoned that the question of paternity is not material to the "in controversy" standard as it is "not required to prove what is at issue in the proceeding — that is, sexual abuse of the child and, further that an exclusion of paternity could not free the respon-

dent from meeting the issue of alleged repeated sexual intercourse with the child." *Id.* at 721. The Court recognized the futility of the exercise if it did not show paternity as it would neither bolster nor undermine the plaintiff's claims of sexual abuse.

The United States Supreme Court in *Schlagenhauf* warned against such improper application of Rule 35 in the context of an automobile accident case:

> The "good cause" and "in controversy" requirements of Rule 35 make it very apparent that sweeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident . . . and a general charge of negligence is lodged . . . to hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result. *Schlagenhauf* at 121-122.

In keeping with *Schlagenhauf*, the Defendant, simply by denying unlawful intercourse with the Plaintiff and of fathering her child, has not placed his physical condition into controversy as contemplated under Rule 35. Rather, it is the Plaintiff who has done so by uncorroborated and self-

contradicted accusations. This is not a sufficient premise upon which a Rule 35 examination can be based. Instead, the Plaintiff should be required to submit additional support instead of her own contradictory statements. Prior to her filing her Motion to Compel, the Plaintiff failed to provide relevant medical records from the facility from which she received prenatal care and where she ultimately gave birth. Therefore, the record is devoid of any supporting documentation of the possible date of conception. Such documentation would have been much less intrusive to obtain, then an intrusion into Mr. Senechal's being, to assist the Plaintiff in her claims and to support her argument under Rule 35. Until the Plaintiff could provide corroborating evidence through the medical records, the lower courts should have denied the Plaintiff's request for DNA testing. Moreover, such evidence contained within the medical records would be objective evidence in evaluating her claim, which is exactly what the SJC was striving for when it required Senechal to undergo the testing. Why allow an intrusive procedure, one that implicates the Fourth Amendment, when a review of the medical records may ultimately result in a conclusion based upon the date of conception.

As in *Schlagenhauf*, a ruling in the Plaintiff's favor in this instance would sanction paternity testing in every personal injury action based upon an alleged sexual assault whereby a child was produced. Compare *Acosta v. Tenneco Oil Company*, 913 F.2d 205, 209 (5th Cir. 1990) (declining to enter a ruling in favor of a mental examination because such would sanction a mental examination in every age

discrimination case); *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (N.D. Fla. 1988) (ruling in favor of a mental examination would endorse mental examinations in every Title VII hostile work environment sexual harassment case). Such a ruling would certainly set a very dangerous precedent and would render meaningless the express limitations of Rule 35.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SUPERIOR COURT
CIVIL ACTION
NO. 97-2187-C

JANE DOE

vs.

WEST LAKE ACADEMY and others[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO COMPEL A RULE 35 EXAMINATION OF DEFENDANT JEFFREY SENECHAL

INTRODUCTION

Plaintiff Jane Doe ("Doe") brought various claims against the defendants, among them, a claim of assault and battery against defendant Jeffrey Senechal ("Senechal"), arising from alleged sexual contact between the Senechal and the plaintiff. Plaintiff now asks the Court to order a buccal swab paternity test of Senechal, at the expense of defendant Health & Education Services, Inc., pursuant to Mass. R. Civ. P. 35.

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[1] Health & Education Services, Inc., Jeffrey Senechal, Robert Johnston, Donald Mosher and Ed Hovestadt.

BACKGROUND

Doe, a ward of the State of Maine, was committed to Westlake Academy ("Westlake"), a secure intensive residential treatment program for mentally ill adolescents run by Health & Education Services, Inc. ("HES") under contract with the Massachusetts Department of Mental Health. Doe attended the Westlake program for approximately twenty-one months. During her last month at Westlake, Doe was allowed to make weekend visits home. Senechal, at the time an HES staff person, transported Doe to the bus station for these visits, with no other persons present. Doe alleges that Senechal engaged in sexual activity with her during these trips. After Doe's transfer from Westlake, Doe learned that she was pregnant, and she later gave birth to a child. Senechal does not acknowledge paternity of the child and refuses to undergo a paternity test (Plaintiff's Ex. 3). Doe testified at deposition that Senechal was the father of her child, because he was the only person with whom she was sexually involved at the time she could have become pregnant (Deposition excerpt,p.225, delivered to the Court during argument). A memorandum prepared by the Assistant Commissioner of the Department of Mental Health notes that Doe told her mother that another man is the father of her child, but Doe denied to a Department investigator that she had sexual relations with this other man (Defendant's Ex. B, at 3).

DISCUSSION

Pursuant to Mass. R. Civ. P. 35, the court may order a party to submit to a physical or mental examination "when the mental or physical condition (including the blood group) of a party ... is in controversy" and the movant has shown "good cause". The moving party, Doe, contends that the paternity test will expedite a resolution of the case because if the result is positive, Senechal's liability will be established. The paternity test sought is a buccal swab, which Doe describes as a scraping of the inner cheek that is neither invasive nor uncomfortable.

Senechal opposes the motion as beyond this Court's power pursuant to Mass. R. Civ. P. 35 and a violation of the Fourth Amendment. As to Mass. R. Civ. P. 35, he argues that the Commonwealth has not recognized its application to compel a personal injury action defendant to submit to paternity testing. He further argues that the test would lead only to immaterial and irrelevant information. With regard to the Fourth Amendment, Senechal argues there is no justification nor case precedent in the context of a personal injury action for what he characterizes as a highly invasive and intrusive test.

II. Rule 35

Mass. R. Civ. P. 35 tracks the Fed. R. Civ. P. 35, as amended. See Reporter's Notes to Mass. R. Civ. P. 35 (1973). The United States Supreme Court has ruled that to support a Fed. R. Civ. P.

35 order, the movant must satisfy "in controversy" and "good cause" requirements. Schlagenhauf v. Holder, 379 U.S. 120, 85 S.Ct. 234, 243 (1964). A condition for which an examination is sought may be placed "in controversy" in two ways: by the nature of the claim or defense in the pleadings, or by an affirmative showing that the condition is in controversy. Id. Some authorities have read Schlagenhauf as permitting one party to place the condition of another party in controversy. See Pearson v. Norfolk-Southern Ry. Co., Inc., 178 F.R.D. 580, 581 (M.D.Ala. 1998)(The mental or physical condition of the person may be placed in issue by another party); Williams v. Sanderson, 904 S.W.2d 212, 215 (Tex.Ct.App. 1995)(Plaintiff may affirmatively show that the defendant's condition is in controversy); 8A Wright, Miller & Marcus, Federal Practice and Procedure, § 2234.1 (1994). But see Grober v. Dept. of Revenue, 956 P.2d at 1234 (Paternity test of defendant denied where defendant placed his condition in controversy through an affirmative defense). The condition sought to be placed in controversy must bear directly on a determination of the merits of an issue and not a collateral matter. State ex rel. C.S. v. Dowd, 923 S.W.2d 444, 448 (Mo.App.E.D. 1996).

The movant for a Rule 35 examination must also establish good cause for the request. "Whether good cause is established depends on relevance and need." Pearson v. Norfolk-Southern Ry. Co, Inc., 178 F.R.D. at 582. In determining need, the court must evaluate the movant's ability

to obtain the information sought by other means. Schlagenhauf v. Holder, 85 S.Ct. at 243.

In the instant case, Senechal challenges the relevance of a paternity test where paternity is not at issue, and where by case law, the test results alone cannot establish conclusively paternity nor the occurrence of sexual intercourse. As to irrelevance, Senechal cites a New York case involving alleged sexual abuse in which the court held that a blood test to establish probable paternity was immaterial because proof of paternity was not required to prove sexual abuse and, in any event, was unnecessary because the subject child could testify at trial. In Re Ivette D., 460 N.Y.S.2d 718, 721 (Fam.Ct.KingsCo.1983). As to the probative value of a paternity test, Senechal cites a Massachusetts decision holding that blood tests for paternity are not conclusive of paternity and do not constitute evidence of intercourse. Commonwealth v. Beausoleil, 397 Mass. 206, 220 (1986).

This court finds that the plaintiff has met her burden of affirmatively placing in controversy the defendant's condition as father of her child by way of her deposition. The deposition specifically asserts that Senechal engaged in sexual intercourse with the plaintiff and identifies him as the only possible father of her child.[2] Contrast R.R.K.

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[2] The Court is aware that the plaintiff is reported to have told her mother that another man, "the man on the bus", was the father of her child, and yet allegedly told an investigator she did not have sexual relations with this man. It is not necessary that the movant prove her case on the merits in order to meet the requirements for a Rule 35 examination. Schlagenhauf 85 S.Ct. at 243.

v. S.G.P., 400 Mass. 12, 19 (1987)(Liacos, J., concurring)(Motion judge's order of blood test to determine defendant's paternity improper where supported only by plaintiff's unsworn, unverified complaint). While it is correct that a paternity test does not respond precisely to the claim of assault and battery, the results of such a test certainly would go far in determining Senechal's liability and cannot be considered as collateral in nature. In combination with the plaintiff's testimony, a positive test result would tend to support the defendant's liability, although a negative result would not preclude liability. But see State ex rel. C.S. v. Dowd, 923 S.W.2d at 449 (Physical exam to determine if defendant was uncircumcised, as plaintiff alleged, not ordered in battery claim for non-consensual sex, because exam results would go only to credibility and not resolve the issue of whether defendant committed battery). The plaintiff has also shown good cause for the examination, because without the evidence relative to paternity there is no objective basis by which to evaluate her claim.

II Fourth Amendment

With respect to Senechal's Fourth Amendment claim, the court is uncertain where to begin its analysis. It is not altogether clear that the plaintiff's request for testing implicates the Fourth Amendment at all. However, the court will assume that judicial enforcement of a request for testing does constitutes "state action" sufficient to invoke Fourth Amendment protections. In order

to satisfy the Fourth Amendment, a test which includes the taking of bodily fluids (or tissues) must be "reasonable". Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, ___ 109, S.Ct. 1402, 1414 (1989). A particular search is reasonable where its promotion of legitimate government interests outweighs its intrusion on the individual's privacy interests. Neither the existence of "probable cause" nor "individualized suspicion" is an absolute prerequisite to the conclusion that a search is "reasonable" within the meaning of the Fourth Amendment. Skinner at 1417.

In any event, here the deposition testimony of the plaintiff establishes probable cause to believe that the requested sample will produce a positive result. She states that she has had a child and that the defendant was the only person with whom she had intercourse during the period when the child was conceived. A positive result will significantly aid the truth-seeking process by providing strong confirmatory evidence of the plaintiff's claim. Indeed, even a negative result will aid the truth-seeking process, because, although not ruling out the claim altogether, it will significantly undermine the plaintiff s credibility. The government has a strong interest in ensuring the integrity of the truth-seeking process in its courts. The intrusion of the buccal swab test upon the physical integrity of Senechal is minimal. The court concludes that, on balance, the request for testing is "reasonable," and an order for testing comports with the Fourth Amendment. See generally Grober v. Department of Revenue,

956 B2nd, 1230, 1234, n. (Alaska, 1998) (Properly executed civil discovery will generally comport with the "reasonableness" requirements of the Fourth Amendment).

The court notes that, even if Senechal possessed a Fourth Amendment right, to refuse the requested testing, the fact of his refusal likely would be admissible at trial, and the jury would be permitted to draw a negative influence against him from such evidence. Compare Quintal v. Commissioner of the Department of Employment and Training, 418 Mass. 855, 861 (1994). (Where party in civil litigation invokes Fifth Amendment right against self-incrimination, the fact-finder may draw inferences against him).

ORDER

For the foregoing reasons, the Court ALLOWS the plaintiff s motion to compel a buccal swab paternity test of defendant Senechal. Plaintiff shall bear the expense of testing.

/s/
Howard J. Whitehead
Justice of the Superior Court

Dated: May 14, 1999

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

A.C. 99-J-359
(Essex Superior Court
Civil #: 97-02187

JANE DOE

vs.

JEFFREY SENECHAL and others[1]

ORDER

The defendant Senechal filed the within petition pursuant to G.L.c. 231, §118, para. 1 requesting interlocutory review of a trial court order entered May 14, 1999. The petition is denied. However, because the issue appears to be one of first impression in the Commonwealth, I will permit an interlocutory appeal to be taken from the judges May 14, 1999 order allowing the plaintiff's Motion for an Examination (buccal swab paternity test) under M.R.C.P. 35. The trial court proceedings shall be stayed pending disposition of this interlocutory appeal.

The defendant is to file his notice of appeal forthwith. Said appeal is entered on the docket

[1] West Lake Academy, Health & Education Services, Inc., Robert Johnston, Donald Mosher and Ed Hovestadt.

without the need of assembly of the record or payment of a fee. The Appeals Court docket number assigned to this appeal is 99-P-1111 and the appellant's brief shall be due on or before August 3, 1999. The appellee's brief is due on or before September 2, 1999. No enlargements shall be allowed. This matter shall be scheduled for oral argument in October, 1999 on a date yet to be determined.

By the Court, (Lenk, J.)

/s/ Chris Micchia

Assistant Clerk

Entered: June 24, 1999

APPENDIX C

Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse,
Boston, Massachusetts 02108
(617) 557-1020

H. Charles Hambelton, Esquire
Gibson & Behman
One Mountain Road
Burlington, MA 01803

RE: Docket No. SJC-08110
JANE DOE
vs.
JEFFREY SENECHAL & others

NOTICE OF DOCKET ENTRY

Please take note that on March 20, 2000, the following entry was made on the docket of the above-referenced case:

RESCRIPT (Full Opinion): Judgment affirmed. (By the Court) Reasons as on file. Notice to counsel.

Susan Mellen, Clerk

Dated: March 20, 2000

To: Jocelyn M. Sedney, Esquire
Deidre Brennan-Regan, Esquire
Wendy J. Murphy, Esquire
Daniel P. Gibson, Esquire
H. Charles Hambelton, Esquire
Kimberly M. McCann, Esquire
Essex Superior Court

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

AT BOSTON, March 20, 2000

IN THE CASE NO. SJC-08110

JANE DOE

vs.

JEFFREY SENECHAL

pending in the Superior Court Department of the Trial

Court for the County of Essex, No. 97-02187

ORDERED, that the following entry be made in the docket; viz., --

Judgment affirmed.

BY THE COURT,

/s/ Lena M. Wong, Asst. CLERK.

March 20, 2000

APPENDIX E

SJC-08110

JANE DOE vs. JEFFREY SENECHAL.

Essex. January 7, 2000. - March 20, 2000.

Present: Marshall, C.J., Abrams, Lynch, Greaney, Ireland, Spina, & Cowin, JJ.

Rules of Civil Procedure. Practice, Criminal, Discovery. Paternity. Evidence, Paternity, Scientific test, Relevancy and materiality. Constitutional Law, Privacy, Search and seizure.

Civil action commenced in the Superior Court Department on November 14, 1997.

A motion to compel a physical examination of the defendant was heard by Howard J. Whitehead, J.

The Supreme Judicial Court granted an application for direct appellate review.

H. Charles Hambelton (Kimberly M. McCann with him) for the defendant.
Jocelyn M. Sedney for the plaintiff.

MARSHALL, C.J. We consider in this case a challenge to an order entered by a judge in the Superior Court pursuant to Mass.R. Civ. P. 35 (a),

365 Mass. 793 (1974),[1] that the defendant[2] undergo a physical examination to determine paternity. The case concerns allegations by the plaintiff, Jane Doe, that Jeffrey Senechal, a staff person, engaged in sexual conduct with her while she was a court-committed patient at an intensive residential treatment facility for mentally ill adolescents, Westlake Academy (Westlake) . Doe became pregnant and gave birth to a child. She has brought various claims against the owner of the facility and various other employees arising from Senechal's alleged tortious sexual contact with her.[3] Senechal has denied any sexual contact with Doe, and denies paternity of the child.

In January, 1999, Doe moved, pursuant to rule 35, for an order requiring Senechal to undergo a

---

[1] Rule 35 (a) of the Massachusetts Rules of Civil Procedure, 365 Mass. 793 (1974), provides:

> "When the mental or physical condition (including the blood group) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person and persons by whom it is to be made."

[2] Other defendants are not parties in this appeal.

[3] Doe seeks recovery for claims of assault and battery against Senechal, as well as claims of negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and violation of her State and Federal civil rights against all of the defendants.

buccal swab paternity test.[4] Senechal opposed the motion on two grounds. First, he claimed that any paternity testing would violate his privacy rights under the Fourth Amendment to the United States Constitution. Second, he argued that his condition as the putative father of the child was not "material" to the case and the test could not be ordered pursuant to rule 35. A judge in the Superior Court disagreed, and ordered Senechal to undergo the paternity test.

Senechal filed a petition before a single justice in the Appeals Court, pursuant to G. L. c. 231, § 118, seeking interlocutory review of and relief from that order. The single justice denied the relief, but permitted Senechal to take an interlocutory appeal. We granted Doe's application for direct appellate review. We now affirm the Superior Court order.

1. Facts. Doe was committed to Westlake, a secure intensive residential treatment facility for mentally ill adolescents operated by Health & Education Services, Inc. (HES), under a contract with the Department of Mental Health (department). Doe had been the victim of severe sexual and physical abuse. She was committed to Westlake for approximately twenty-one months, beginning in February, 1993. During her last month at the facility she was permitted to leave periodically for weekend visits with her parents in

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[4] A buccal swab paternity test involves the rubbing of a swab on the interior surface of the cheek to obtain cells that are then evaluated, using PCR (polymerase chain reaction) for deoxyribonucleic acid (DNA) analysis.

Maine. Senechal, an employee of HES, drove Doe to the bus station[5] Doe alleges that in the course of escorting her to the bus station Senechal engaged in various sexual activities with her, including intercourse. After Doe was transferred from Westlake to a less secure facility in Maine, she learned she was pregnant. Doe identified Senechal as the father. She testified at deposition that he was the only person with whom she had sexual intercourse during the relevant time period.[6]

On discovering that Doe was pregnant, the Maine Department of Mental Health reported the matter to the department, which investigated the case, focusing on the circumstances surrounding three specific dates on which Doe alleged she had sexual intercourse with Senechal. The department concluded that it was not possible that any sexual contact had occurred on one such date, and it was unlikely that sexual intercourse occurred on a second. However, for one date, June 18, 1995, the department determined that Senechal had been alone with Doe, but that, because there were no records available from Westlake concerning the length of time they were alone to-

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[5] In programs operated by or under contract with the department, single-person escorts are discouraged for the safety of both residents and staff, and to prevent false allegations with respect to or by either.

[6] The child has been adopted by a third party. According to Doe's appellate counsel, the child's adoptive parents are willing to make the child available for purposes of testing to establish paternity.

gether, the department could not determine beyond a "reasonable doubt" whether sexual intercourse could have occurred.[7] The department could not, therefore, substantiate the allegation. It nevertheless recommended that it would be "prudent" for Senechal to agree to take part in a paternity test to determine whether he is the father of the child. Senechal refused.

2. Mass. R. Civ. P. 35. Senechal first argues that the judge in the Superior Court abused his discretion by ordering a physical examination under rule 35. That rule permits a judge to order any party to submit to a physical examination by a physician only if his physical condition is "in controversy" and if the moving party has established "good cause" for the test to proceed. See note 1, supra. Senechal claims that neither prerequisite is met in this case because the question of paternity does not bear directly on the proof of any of the elements of Doe's several causes of action. Doe responds that her sexual contact with Senechal bears directly on her claim of assault and battery against him, as well as on her various claims for damages.

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[7] June 18, 1995, according to the department's report, was "within reason" as a conception date of Doe's child. Senechal argues here that the date of conception cannot be determined with certainty because Doe has not produced certain records in response to his discovery requests. Senechal did not raise this issue in the Superior Court and we therefore do not address it. See Oro-frio v. Department of Mental Health, 408 Mass. 605, 612613 (1990), S.C., 411 Mass. 657 (1992).

Parties to a civil action generally "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Mass. R. Civ. P. 26 (b) (1), 365 Mass. 772 (1974). Rule 35 (a) by its express terms is more restrictive, requiring a greater showing of need: in every case where a party requests a mental or physical examination, a judge "must decide, as an initial matter" whether the party "has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause.'" Schlagenhauf. v. Holder, 379 U.S. 104, 118-119 (1964) (discussing Federal counterpart to rule 35).[8] In addition, the requirements of rule 35 are not met "by mere conclusory allegations of the pleadings -- nor by mere relevance to the case -- but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." Id. at 118. See State ex rel. C.S. v. Dowd, 923 S.W.2d 444, 447-448 (Mo. Ct. App. 1996).

A matter may be placed "in controversy" in a civil action by the nature of the claim or defense;

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[8] The language of rule 35 (a) tracks the corresponding Federal rule. Reporters' Notes to Mass. R. Civ. P. 35, Mass. Ann. Laws, Civil Procedure at 26 (Lexis 1997). In construing our rules of civil procedure, we are guided by judicial interpretations of the cognate Federal rule "absent compelling reasons to the contrary or significant differences in content." Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 414 (1998), quoting Rollins Envtl. Servs., Inc. v. Superior Court, 368 Mass. 174, 179-180 (1975).

for example, a plaintiff in a negligence action who asserts mental or physical injury, or a defendant who asserts his mental or physical condition as a defense to a claim, such as an insanity defense to a divorce action. See Schlagenhauf v. Holder, supra at 119, and cases cited. Here, Senechal claims he did not assert his physical "condition," paternity, in support of his defense; rather his condition was placed in issue by Doe. In such circumstances, Doe is required to make an "affirmative showing" that Senechalls physical condition is in controversy and that there was good cause for the examination requested.[9] Id. at 119-120.

The motion judge correctly concluded that Doe made the necessary showing that Senechal's condition as the putative father of her child was "in controversy." Doe has alleged that Senechal engaged in tortious sexual conduct with her, including a claim of assault and battery against him,

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[9] The Supreme Court of the United States in Schlagenhauf v. Holden, 379 U.S. 104, 119 (1964), provides further guidance on this point:

> "This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the [trial] judge can fulfill his function mandated by the Rule."

which he has denied. If Doe were to demonstrate through reliable evidence that Senechal is the father of a child conceived while she was under his supervision, she would prove, at least, that an intentional touching had taken place, one element of that claim. See id. at 118-119 (matter is "in controversy" if it relates directly to the proof or defense of the underlying cause of action). Cf. State ex rel, C.S. v. Dowd, supra, and cases cited.[10] Doe has also made an affirmative showing that Senechal had the opportunity to engage in sexual intercourse with her: they were alone on at least one occasion during the relevant period, June 18, 1995, when Senechal drove her to the bus station. That date, the most likely date of any sexual activity between them, corresponds with an approximate date of conception of Doe's child. At her deposition, Doe identified Senechal as the only possible father of her child. Her testimony directly counters Senechal's denial of any sexual activity between them, as well as his denial of paternity. As the motion judge correctly observed, while a paternity test cannot substantiate completely Doe's claim of assault and battery,

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[10] In State ex rel, C.S. v. Dowd, 923 S.W.2d 444, 449 (Mo. Ct. App. 1996), the court held that a physical examination to determine whether a defendant had been circumcised was not "in controversy" in a battery case. The court reasoned that "[e]ven if a physical examination disclosed that (the defendant in underlying action] was not circumcised, this fact would not prove any of the elements of battery: that [he] had intentional, offensive bodily contact with [the plaintiff in underlying action]." Id.

the results of such a test cannot be viewed as collateral.

The issue of Senechal's paternity also bears substantially on Doe's claims for damages for the resulting physical injury from the alleged improper sexual contact, her pregnancy, and any emotional distress she has and will continue to have as a result of the pregnancy. Her claims therefore relate not only to the tortious sexual assault (intercourse), but to her pregnancy and the birth of her child. Doe also observes that Senechal has asserted in his pleadings that another man is the child's father,[11] and has alleged as an affirmative defense that Doe's damages were "the actions of a third person over whom the Defendants did not exercise control." These pleadings lend further support to the conclusion that Senechal's condition as the father of Doe's child is "in controversy." Cf. Vargas v. Vargas, 54 A.D.2d 590 (N.Y. Sup. Ct. 1976) (claim that defendant secured plaintiff's consent to marriage by false representation he was cause of her pregnancy placed issue of paternity in controversy); State ex rel. Keithline v. Jennings, 463 P.2d 690, 692 (Okla. 1970) (order to compel blood testing appropriate where petitioner claimed defense of fraud in inducement of contract he signed for child support, but later claimed he had relied on deceit of mother).

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[11] Doe reportedly told her mother that another man, "the man on the bus," was the father of her child, while she allegedly told an investigator that she did not have sexual relations with such a man.

Doe has also satisfied her affirmative burden that there is "good cause" to compel Senechal's examination. The judge concluded that, without evidence that Senechal is the child's biological father, "there is no objective basis by which to evaluate her claim." We agree. Although there is evidence from which a jury could conclude that Senechal had the opportunity to inflict the tortious injury, Doe has no other source from which to draw her proof of improper sexual contact, other than her own testimony. Cf. Marroni v. Matey, 82 F.R.D. 371, 372 (E.D. Pa. 1979) (not good cause for examination if plaintiff could obtain information by other discovery methods that would be less intrusive on defendant's privacy interests); 8A C.A. Wright, A.R. Miller & R.L. Marcus, Federal Practice and Procedure § 2234.1 (2d ed. 1994) ("The court may decide to refuse the examination if the information sought is available from other sources"). Particularly where Senechal has denied that he ever engaged in sexual conduct with Doe, confirmation from a DNA profiling method that is recognized as a scientifically valid methodology, see Commonwealth v. Vao Sok, 425 Mass. 787, 799 (1997), would go far in assisting the trier of fact to determine Senechal's liability, as the motion judge observed.

A judge has broad discretion in determining whether to order a physical examination pursuant to rule 35. Absent an abuse of that discretion, we shall not reverse a judge's decision on that or other matters of discovery. There was none here.

3. Fourth Amendment. Senechal argues that the prohibition of the Fourth Amendment against unreasonable searches and seizures is an independent ground for quashing the judge's discovery order because he has a right to be free from "government sponsored intrusions into the integrity" of his own body.

The civil litigation here concerns private litigants, and Senechal points to no authority for his proposition that the Fourth Amendment has any application in this context. See Bowerman v. MacDonald, 431 Mich. 1, 19 (1988) (defendant did not cite and court was unaware of "any cases in which otherwise properly constituted discovery in a civil action has been held to constitute a violation of the Fourth Amendment").[12] To the contrary, in Schlagenhauf v. Holder, supra at 114, the Supreme Court made no mention of a possible Fourth Amendment constraint, holding that "Rule 35 . . . is free of constitutional difficulty."

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[12] In civil cases the constraints of the Fourth Amendment do apply to government litigants in certain circumstances, such as subpoenas duces tecum issued in the course of investigation by grand juries or administrative agencies. See, e.g., United States v. Dionisio, 410 U.S. 1, 11 (1973); See v. Seattle, 387 U.S. 541, 542-544 (1967) (city fire department inspector may not enter and inspect commercial warehouse as part of routine, periodic city-wide code-compliance canvass without warrant and without probable cause to believe violation of any municipal ordinance existed); United States v. Morton Salt Co., 338 U.S. 632, 652-653 (1950) (Fourth Amendment requires administrative agency subpoena of corporate books or records be limited, relevant, and specific). See also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613-614 (1989).

In any event, the physical examination ordered here -- the buccal swab paternity test -- would meet the standard of reasonableness.[13] The cells to be extracted from Senechal will provide test results that will significantly aid Doe in establishing liability, or may substantially exclude Senechal as the father of her child. In short, the "reasonable expectation is that the test results will strongly point to, but not conclusively prove" the answer to whether Senechal caused Doe's pregnancy. Matter of a Grand Jury Investigation, 427 Mass. 221, 226 (1998).

Order affirmed.

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[13] There are a scattering of reported decisions where courts have declined to decide whether the Fourth Amendment applies to civil discovery orders among private litigants, but have nevertheless considered the "reasonableness" of the discovery order. See, e.g., Bowerman v. MacDonald, 431 Mich. 1, 19 (1988). See also United States v. International Business Machs. Corp.,83 F.R.D. 97, 103 (S.D.N.Y. 1979) (assuming Fourth Amendment applies to civil discovery subpoena and applying reasonableness test); Ambassador College v. Goetzke, 244 Ga. 322, 325 (1979) (Hill, J., concurring), cert. denied, 444 U.S. 1079 (1980) (court should consider in "proper" case whether discovery is being used by civil litigants pursuing unsubstantiated claims in violation of rights protected by Fourth Amendment, and whether probable cause requirement of Fourth Amendment is applicable to civil discovery orders).